STATE OF MICHIGAN

COURT OF APPEALS

GREEN TREE SERVICING, LLC, f/k/a CONSECO BANK, INC, Plaintiff-Appellee, v STEVE WRIGHT and ROBERT WRIGHT, Defendants-Appellants.	UNPUBLISHED February 20, 2014 No. 310567 Kent Circuit Court LC No. 11-006577-PD

GREEN TREE SERVICING, LLC, f/k/a CONSECO BANK, INC, Plaintiff-Appellee, v STEVE WRIGHT and ROBERT WRIGHT, Defendants-Appellants.	 No. 315245 Kent Circuit Court LC No. 11-006577-PD

Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

In Docket No. 310567, defendants appeal by leave granted, a May 14, 2012, trial court order denying their motion for summary disposition. In Docket No. 315245, defendants appeal as of right a February 20, 2013, trial court order denying their renewed motion for summary disposition and granting plaintiff's renewed motion for summary disposition. For the reasons set forth in this opinion, we affirm.

I. FACTS

On August 1, 2000, defendants purchased a mobile home from JWF, LLC, for $36,852. To finance the purchase, defendants executed a retail installment contract for the purchase price with an interest rate of 14.89 percent per annum. On the same day, JWF assigned the retail installment contract to Conseco Finance Servicing Corp, which later changed its name to Green

Tree Servicing, LLC (hereinafter "plaintiff"). Plaintiff placed a lien on the mobile home as security.

About one year later, in August 2001, defendants contacted plaintiff about modifying the installment contract. In response, Conseco Bank, an affiliate of plaintiff, sent defendants a packet of documents. Conseco Bank was a Utah-chartered bank regulated by the FDIC.

On or about October 9, 2001, Conseco Bank and defendants executed a Manufactured Home Promissory Note, Security Agreement and Disclosure Statement (the Note) in the original amount of $39,628.59, at an interest rate of 13.75 percent per annum. As part of the security agreement Conseco Bank obtained a lien on the mobile home.[1]

The parties stipulated that Conseco Bank paid plaintiff $39,628.59 and assigned the Note (in its entirety including the security agreement) to plaintiff. Plaintiff introduced a copy of a check showing that Conseco Bank paid it $39,628.59 on October 16, 2001, seven days after the Note was executed and on the same day that Conseco Bank assigned the Note to plaintiff.

The parties argued over the fate of the original retail installment contract. Defendants argued that plaintiff assigned the installment contract to Conseco Bank after the bank "bought" the contract from plaintiff. Defendants introduced a copy of an undated "Notice of Assignment" purporting to show that plaintiff assigned the installment contract to Conseco Bank. As such, defendants argued, Conseco Bank was an "assignee" of plaintiff and stood in the shoes of the seller of the mobile home. In contrast, plaintiff argued that the check from Conseco Bank extinguished all debt owing on the installment contract and therefore Conseco Bank was not plaintiff's "assignee."

From November 15, 2001, through June 2, 2011, defendants made payments on the Note that totaled $56,569.42. In 2011, however, defendants defaulted on the Note and on July 15, 2011, plaintiff commenced this lawsuit seeking delivery of the mobile home and a money judgment of $40,089.24—the entire unpaid principal and interest remaining on the Note.

Initially, both parties filed competing motions for summary disposition and the trial court denied the motions. Defendants applied for leave to appeal in this Court. While defendants' application was pending, pursuant to MCR 2.116(A), the parties filed a stipulated statement of facts and requested that the trial court decide the case on summary disposition.

Both parties filed briefs in support of their competing motions for summary disposition. Defendants did not dispute that they defaulted on the Note; instead, defendants argued that the Note was usurious under MCL 438.31c(8), a subsection of Michigan's usury act, MCL 438.31 *et seq*. and therefore defendants were entitled to have all of the interest paid on the Note applied to the principal. MCL 438.31c(8) provides in relevant part as follows:

[1] It is undisputed that Conseco Bank did not perfect its security interest in the mobile home.

> Subject to the title transfer provisions of [MCL 125.2330c and 125.2330d] . . . the parties to an extension of credit which is secured by a lien on a mobile home taken or retained by *the seller of a mobile home* to secure all or part of the purchase price of the mobile home and which is not a retail installment transaction *may agree in writing to a rate of interest not to exceed 11% per annum* . . . [MCL 438.31c(8) (emphasis added).]

The usury act also contains a remedial provision, which states in relevant part as follows:

> Violation of act; attorney fees and court costs, recovery.
>
> Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns.

Defendants agreed that the original retail installment contract was not subject to MCL 438.31c(8), but argued that Conseco Bank obtained status as "seller" of the mobile home because plaintiff assigned the retail installment contract to Conseco Bank. Therefore, Conseco Bank was barred from executing the Note with an interest rate that exceeded 11-percent. Defendants claimed that Conseco Bank violated the usury act when it executed the Note with an interest rate over 11-percent. Defendants claimed that, because the Note was usurious, they were entitled to have all their payments applied to the principal of the Note, and as such, the Note should be considered paid in full.

Plaintiff argued that the Note was not subject to the usury statute because Conseco Bank was a new creditor that extinguished the original debt on the installment contract and issued new financing to defendants. Plaintiff argued that Conseco Bank was not a "seller" of a mobile home and was not an assignee of the original installment contract. Instead, Conseco Bank extinguished the installment contract and issued new financing to defendants. Therefore, because the Note was an entirely new transaction—i.e. as opposed to a sale of a mobile home, it was not subject to the usury act. Furthermore, plaintiff argued, irrespective of the nature of the Conseco Bank transaction, Michigan's usury statute was preempted by 12 USC § 1831d, a subsection of the Federal Depository Insurance Act, 12 USC § 1811 *et seq*., which provides in part that state-charted, federally insured banks may, in certain instances, charge any interest rate allowed in their home state irrespective of another state's usury laws. Plaintiff argued that because Conseco Bank was a Utah chartered, federally insured bank, and because Utah did not limit interest rates that could be charged on a loan, the Note was valid under § 1831d irrespective of Michigan law.[2] Plaintiff also argued that Utah law trumped Michigan law because of a choice-of-law provision

[2] Defendants countered that 12 USC § 1735f-7a, a subsection of the National Housing Act, 12 USC § 1701 *et seq*., was the applicable federal provision and argued that this Court previously held that § 1735f-7a did not preempt Michigan's usury statute.

in the Note, and maintained that there was no other issue of fact regarding whether defendants' defaulted on the Note.

On February 20, 2013, the trial court entered an opinion and order denying defendants' motion for summary disposition and granting plaintiff's motion for summary disposition. The court held that MCL 438.31c(8) did not apply to the Conseco Bank transaction, explaining:

> [T]he plain language of the statute clearly limits the interest rate restriction to the extension of credit where the "*seller*" retains a security interest to secure "*all or part of the purchase price*." In the instant case the purchase price of the mobile home has been paid. When Conseco Bank made the loan on October 9, 2001 to pay off the Retail Installment Contract . . . it effectively extinguished the obligation due the seller (Conseco Finance) and created a new debtor creditor relationship between Defendants and Conseco Bank. Conseco Finance was subsequently assigned the security interest granted under the new Instrument by Conseco Bank. Therefore, the security interest now being enforced is the security interest granted to secure the repayment of the indebtedness due to Conseco Bank under the October 9, 2001 Instrument and has no relation to the security interest from the original retail installment transaction.

In addition, the trial court held that, even if MCL 438.31c(8) did apply to the Conseco Bank transaction, defendants would not be entitled to relief because MCL 438.31c(8) was preempted by 12 USC § 1831d(a), and because the Note contained a choice of law provision indicating that Utah law governed the transaction.

The trial court entered a judgment in favor of plaintiff in the amount of $40,089.24, with attorney fees, expenses of collection and costs for a total judgment of $54,261.25 and the court ordered defendants to surrender possession of the mobile home. Defendants appealed the trial court's February 20, 2013, order as of right in Docket No. 315245, and that appeal was consolidated with defendants' original application for leave to appeal, which this Court ultimately granted in Docket No. 310567.[3]

II. ANALYSIS

Defendants argue that the trial court erred in denying their motion for summary disposition and in granting plaintiff's motion for summary disposition.

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) and plaintiff moved for summary disposition pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10). The trial court did not indicate which rule it relied on in

[3] *Green Tree Servicing, LLC v Steve Wright*, unpublished order of the Court of Appeals, entered September 16, 2013 (Docket No. 310567).

granting plaintiff's motion; however, because the court considered facts outside the pleadings, the court's decision is considered as having been granted pursuant to MCR 2.116(C)(10). *Mitchell Corp of Owosso v Dep't of Consumer & Industry Servs*, 263 Mich App 270, 275; 687 NW2d 875 (2004). In reviewing an order on a motion under MCR 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Summary disposition is appropriate under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* at 552. Resolution of this case requires that we construe the relevant statutory provisions underlying the trial court's decision. The interpretation and application of a statute involves a question of law that we review de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

Defendants contend that the trial court erred in concluding that MCL 438.31c(8) did not apply to the Note. MCL 438.31c(8) provides in relevant part:

> [T]he parties to an extension of credit which is secured by a lien on a mobile home taken or retained by *the seller of a mobile home to secure all or part of the purchase price* of the mobile home and which is not a retail installment transaction *may agree in writing to a rate of interest not to exceed 11% per annum* . . . . [Emphasis added.]

Defendants agree that the original retail installment contract was not subject to MCL 438.31c(8); however, defendants contend that the Note was subject to the statute because Conseco Bank became the "seller" of the mobile home when it took assignment of the installment contract. We disagree.

MCL 438.31c(8) concerns the sale of mobile homes and the financing meant to secure the sale price of a mobile home. Not including retail installment contracts, MCL 438.31c(8) applies to transactions where the "seller" of a mobile home retains a lien to secure "*all or part of the purchase price of [a] mobile home*" (emphasis added). In this case, Conseco Bank was not the "seller" of the mobile home that retained a security interest on defendants' mobile home to secure "all or part of the purchase price of the mobile home." Instead, at the time the bank and defendants executed the Note, defendants owned the mobile home. JWF had already sold the mobile home to defendants. The sale was complete and Conseco Bank was a new creditor that extended new financing to defendants before extinguishing defendants' pre-existing debt arising from the sale of the mobile home. Conseco Bank and defendants entered into a new creditor-debtor relationship that was independent of the sale of the mobile home. Accordingly, the Note was not subject to MCL 438.31c(8).

Defendants argue that Conseco Bank obtained status as the "seller" because plaintiff assigned the retail installment contract to Conseco Bank. This argument lacks merit. As discussed above, Conseco Bank executed the Note and used the proceeds of the Note to purchase the retail installment contract from plaintiff. Thus, at the time it executed the Note, Conseco Bank was not plaintiff's "assignee" and MCL 438.31c(8) did not apply to the transaction. Because MCL 438.31c(8) did not apply to the transaction, defendants are not entitled to the remedies in MCL 438.32. See *FDIC v Bergan*, 210 Mich App 698, 705; 534 NW2d 250 (1995)

(noting that MCL 438.32 is "the forfeiture provision of Michigan's usury statute . . . [and] is generally penal in nature").

In sum, the trial court did not err in denying defendants' motion for summary disposition and in granting plaintiff's motion because the Note was not subject to MCL 438.31c(8). Given our resolution of this issue, we need not address defendants' remaining arguments concerning federal preemption and the choice of law provision. Because the trial court properly determined that MCL 438.31c(8) did not apply to the Conseco Bank transaction, its conclusions with respect to these other issues amounted to dicta. See *Mt. Pleasant Pub Sch v Mich AFSCME Council 25*, 302 Mich App 600, ___; 840 NW2d 750, 757 (2013) (defining dictum as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case. . . ." (Quotation and citation omitted)).

Affirmed. No costs awarded to either party. MCR 7.216(A)(7).

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Jane M. Beckering